88-394

No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN S. LYTLE,

Petitioner,

v.

HOUSEHOLD MANUFACTURING INC.,
d/b/a SCHWITZER TURBOCHARGERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
RONALD L. ELLIS
JUDITH REED*
ERIC SCHNAPPER
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

PENDA D. HAIR
1275 K Street, N.W.
Suite 301
Washington, D.C. 20005
(202) 682-1300

Attorneys for Petitioner

*Counsel of Record

QUESTION PRESENTED

Did the Fourth Circuit correctly hold that district court violations of the Seventh Amendment are unreviewable by the appellate courts if the trial judge, after violating the Amendment by refusing to empanel a jury, compounds that constitutional infraction by deciding himself the very factual issue which should have been presented to and decided by a jury?

PARTIES

All parties in this matter are set forth in the caption.

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The petitioner, John S. Lytle, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit entered in this proceeding on October 20, 1987.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is set out in the Appendix to this petition at pages 1a-21a. The order of the court of appeals denying rehearing, which is not reported, is set out at pp. 22a-24a of the Appendix. The district judge's bench opinion, which is unreported, is set out in the Appendix, at pp. 25a-31a. The order of the district court dismissing the case is set out in the Appendix at pp. 34a-35a.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of the case was entered on October 20, 1987. (App. 1a.) A timely petition for rehearing was denied on April 27, 1988.

On July 19, 1988, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including August 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Section 1981 of 42 U.S.C. provides:

> All persons within the jurisdiction of the united States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-(2)(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or

> otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin....

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

> Such demand may be indorsed upon a pleading of the party.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

Petitioner filed this action in December, 1984, alleging that the respondent employer had engaged in racial discrimination in violation of Title VII of the 1964 Civil Rights Act and of 42 U.S.C. § 1981. Petitioner claimed specifically that respondent had fired

him because of his race, and that respondent subsequently had retaliated against him because he had filed a charge of discrimination with the EEOC. Petitioner requested a jury trial on his section 1981 claims.

Petitioner's discrimination claims raised several straightforward factual issues. Petitioner was dismissed in August of 1983 after he had missed two days of work due to illness. Petitioner asserted that he had notified respondent in advance that he would be absent, and that company officials had agreed to his taking the days off. Company officials insisted that the absence was in fact unexcused. There was also conflicting evidence regarding how respondent treated white workers who had problems with absenteeism.

The district court dismissed plaintiff's claims under section 1981, holding -- despite Runyon v. McCrary, 427 U.S. 160 (1976) and Johnson v. Railway Express Agency, 421 U.S. 454 (1975)-- that Title VII ordinarily provides the exclusive remedy for employment discrimination. (App. 26a). Having thus removed petitioner's legal claims, the district judge conducted a bench trial on the equitable Title VII claims. At the close of the plaintiff's case, the district judge dismissed the discriminatory discharge claims; following the close of all the evidence, the judge ruled from the bench in favor of respondent on the retaliation claim. (App. 26a-31a). The trial judge subsequently entered a judgment for defendant on all issues. (App. 32a-35a).

Petitioner appealed to the Fourth Circuit, arguing, inter alia, that he had been denied his right to a jury trial in violation of the Seventh Amendment. A majority of the Fourth Circuit panel acknowledged that the dismissal of petitioner's § 1981 claim, and thus the denial of a jury trial, was "apparently erroneous." (App. 7a n.2). The panel concluded, however, that that constitutional error was "not controlling," because an appellate court was powerless to correct any such Seventh Amendment violation. The panel insisted that the district judge's decision on the merits of petitioner's allegations, even though issued in contravention of the Seventh Amendment, could be relied on to collaterally estop the petitioner from litigating the claims involved before a jury. (App. 8a-9a). Finding that the

judge's resolution of the factual issues was "not clearly erroneous," the majority affirmed. (App. 10a-13a).[1]

Judge Widener, in a dissenting opinion, noted that the majority's view of collateral estoppel was inconsistent with a seventh circuit decision on "exactly this issue" in Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987) (App. 19a), and that it was "not consistent with" the recent decision of this Court in Tull v. United States, 95 L.Ed.2d 365 (1987). (App. 19a

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[1] The district judge found that petitioner had failed to establish a prima facie case with regard to his dismissal claim. (App. 26a-29a). The court of appeals reasoned that whether or not petitioner had made out a prima facie case turned on a number of disputed subsidiary facts; the appellate court found that the trial judge's resolution of those subsidiary issues, and thus his conclusion regarding the sufficiency of the evidence to establish a prima facie case, were not clearly erroneous. (App. 10a-12a).

n.4). Judge Widener criticized the majority's reliance on the earlier Fourth Circuit decision in Ritter v. Mount Saint Mary's College, 814 F.2d 986 (4th Cir. 1987), insisting that the circumstances and thus the issue in Ritter were "significantly different" than in the instant case. (App. 18a). Judge Widener concluded that if the appellate courts were powerless to correct the erroneous denial of a jury trial merely because the judge involved had issued a constitutionally tainted decision of his own on the merits, "the Seventh Amendment means less today than it did yesterday." (App. 19a). A timely petition for rehearing and suggestion for rehearing en banc were denied; Judges Widener, Russell and Murnaghan voted to rehear the case en banc. (App. 22a-24a).

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE FOURTH CIRCUIT HAS BEEN EXPRESSLY REJECTED BY FOUR OTHER CIRCUITS, AND IS INCONSISTENT WITH THE PRACTICES OF NINE OTHER CIRCUITS

As Judge Widener observed in his dissenting opinion below, (App. 19a), this case presents a clear conflict among the circuits regarding a problem of considerable importance -- whether Seventh Amendment violations are rendered unreviewable if the trial judge who improperly denied a jury trial compounds that constitutional error by deciding himself the very issue that should have been decided by a jury. The Fourth Circuit has now twice held that such constitutional violations can neither be reviewed nor corrected on appeal. These decisions of the Fourth Circuit are flatly inconsistent with the practice in nine other circuits, and the reasoning of the

decision below has been expressly rejected by recent decisions in the Second, Third, Seventh and District of Columbia Circuits.

These inter-circuit conflicts arise out of a dispute regarding the meaning of this Court's decision in Parklane Hosiery v. Shore, 439 U.S. 332 (1979). In Parklane Hosiery certain factual issues, regarding which the petitioner would otherwise have been entitled to a jury trial, had earlier been decided adversely to petitioner by a trial judge in another action. This Court held that collateral estoppel, based on a prior decision in a non-jury trial, could be used to preclude litigation of those same issues before a jury. 439 U.S. at 333-37. Footnote 24 of the majority opinion expressly noted that the lack of a jury in the earlier proceeding, an equitable injunctive action brought by the SEC, was entirely proper.

439 U.S. at 337 n. 24.[2] But the majority opinion was silent regarding whether collateral estoppel might also be available where the earlier denial of a jury trial was erroneous, and as to whether collateral estoppel might be invoked in order to prevent correction of that very error. In a dissenting opinion in Parklane Hosiery, Chief Justice Rehnquist warned that the majority opinion might be interpreted as calling into question the longstanding rule that an intervening non-jury decision on the merits of a case did not preclude an appellate court from reversing the earlier improper denial of a jury trial. 439 U.S. at 351 n. 19.[3]

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[2] See also 439 U.S. at 351 n. 18 (Rehnquist, J., dissenting).

[3] "Meeker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963) (per curiam), is a case where the doctrine of collateral estoppel yielded to the right to a jury

The Fourth Circuit's expansive view of Parklane Hosiery began last year in Ritter v. Mount Saint Mary's College, 814 F.2d 986 (4th Cir. 1987), cert. denied ___ U.S. ___ (1987).[4] In Ritter, the Fourth

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trial. In Meeker, plaintiffs asserted both equitable and legal claims, which presented common issues, and demanded a jury trial. The trial court tried the equitable claim first, and decided that claim, and the common issues, adversely to plaintiffs. As a result, it held that plaintiffs were precluded from relitigating those same issues before a jury on their legal claim.... Plaintiffs appealed, alleging a denial of their right to a jury trial.... This Court reversed ... on the basis of Beacon Theatres Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), even though, unlike those cases, the equitable action in Meeker had already been tried and the common issues determined by the court. Thus, even though the plaintiffs in Meeker had received a "full and fair" opportunity to try the common issues in the prior equitable action, they nonetheless were given the opportunity to retry those issues before a jury. Today's decision is totally inconsistent with Meeker and the Court fails to explain this inconsistency."

[4] In opposing review by this Court in Ritter, the respondent emphasized that the trial judge's resolution of the

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equitable Title VII claim in that case had been upheld in an earlier appeal, and was thus not in dispute when it was relied on to collaterally estop the plaintiff from receiving a jury trial. The respondent in Ritter conceded that the application of collateral estoppel in the circumstances presented by the instant case would be both incorrect and inconsistent with the Seventh Circuit decision in Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987):

> "In Ritter, petitioner had numerous opportunities to avoid the application of collateral estoppel, but availed herself of none.... During her first appeal she had the opportunity to seek prevention of the application of collateral estoppel by requesting reversal of the Title VII judgment based on the arguments she makes here.
>
> "In Hussein ...[u]nlike Ritter ... [t]he Seventh Circuit was requested to invoke collateral estoppel in Hussein's first and only appeal. If it did so, Hussein would have been deprived of any opportunity to develop his legal claims and present them to a jury....
>
> "... Ritter and Hussein differ because there was an earlier valid and reviewed judgment in Ritter, but not in Hussein. The Fourth Circuit reviewed and affirmed the Title VII judgment in the first appeal, and was

Circuit acknowledged that the trial judge, in passing on the disputed facts rather than referring them to a jury, had violated the Seventh Amendment, but insisted that it was permitted, indeed required, to give conclusive weight to that very constitutionally tainted decision. "The fact that the judge in this case was in error in dismissing the legal claims ... is irrelevant." 814 F.2d

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not asked to vacate that judgment until the second appeal.... Hussein, on the other hand, presented a situation where there was no earlier valid judgment. The Title VII judgment there was on review for the first time so the appellate court was not asked to vacate its earlier judgment. The Seventh Circuit used the lack of an earlier valid judgment in its attempt to distinguish Parklane.... That distinction is absent in the instant case."

Respondent's Brief in Opposition, No. 87-309, pp. 6-7.

at 991.[5] Even though the bench trial that had occurred in Ritter violated the constitution, the fourth circuit insisted, "One trial of common facts is enough." Id. A plaintiff's right to the constitutional trial guaranteed by the Seventh Amendment, it reasoned, had to give way under Parklane Hosiery to "the interests of the judicial system in a speedy and economical resolution of litigation." Id. The fact that a plaintiff would lose his or her right to a jury trial because of the error of the trial judge was, in the words of the circuit court, only "apparently unfair." 814 F.2d at 991.

The panel decision in the instant

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5 This Court subsequently held that state courts cannot rely on such constitutionally infirm prior decisions. Johnson v. Mississippi, 100 L.Ed.2d 575 (1988).

case expands Ritter[6] and Parklane Hosiery to the point where they virtually preclude enforcement of the Seventh Amendment following an unconstitutional non-jury verdict. First, the decision below extends Ritter to a case in which the validity of the non-jury verdict on the equitable issues was itself challenged on direct appeal; as Judge Widener noted in his dissent, the plaintiff in Ritter was not challenging that portion of the district judge's action in that case. (Pet. App. 17a). Second, the panel in the instant case holds that, since the appellate courts are powerless to correct

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6 Judge Widener observed in his dissenting opinion below that the circumstances of Ritter were distinguishable from those of the instant case, since at the time when the collateral estoppel issue arose the plaintiff in Ritter was no longer challenging the trial judge's rejection of her equitable Title VII claims. (App. 17a-18a).

a Seventh Amendment violation, a circuit court simply has no reason to decide whether the action of the trial judge denied one of the parties its constitutional right to trial by jury.

> This court held in Ritter ... that the findings of the trial court made in a Title VII action are entitled to collateral estoppel effect, thus preventing relitigation of those facts before a jury under a "legal" theory arising out of the same facts. We found that collateral estoppel would obtain even where the trial court had erroneously dismissed the plaintiff's legal claims. As the Supreme Court determined in Parklane Hosiery ..., the judicial interest in economy of resources is sufficient to override the litigant's interest in relitigating his case, even where the consequence of the failure to permit relitigation is to deny the plaintiff his right to a jury trial. Whether the district court has committed error in striking the appellant's [legal] claims ... is not controlling.

(App. 8a-9a). It is perhaps coincidental, but nonetheless disturbing, that these two

landmark Fourth Circuit decisions, holding that the unconstitutional denial of a jury trial cannot be corrected on appeal, both come in cases in which the underlying legal claim involved intentional invidious discrimination, in which the unconstitutional bench trial resulted in a judgment for the defendant, and in which, at least in the instant case, the trial court's reasons for denying a jury trial seem insubstantial.[7]

No other circuit permits the use of collateral estoppel to prevent correction on appeal of an unconstitutional denial of a jury trial. The interpretation of

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7 In the instant case, the Fourth Circuit noted that the legal claims stricken by the district judge had long before been held by that court of appeals to state a cause of action. (Pet. App. 7a, n. 2). The first Fourth Circuit opinion in Ritter, holding that the legal claims in that case were not properly dismissed prior to trial, is not published. (See App. 16a).

Parklane Hosiery embraced by the Fourth Circuit in this case and Ritter has twice been expressly rejected by the Seventh Circuit. Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988). The procedural posture of Hussein was precisely the same as that in the instant case; after the trial judge there erroneously dismissed the plaintiff's legal claims and then decided himself the underlying factual questions, the defendant insisted on appeal that Parklane Hosiery precluded an appellate court from correcting such a constitutional violation. The Seventh Circuit rejected this interpretation of Parklane Hosiery:

> Oshkosh Truck argues that, despite the prohibitions of the seventh amendment and the concerns noted in Beacon Theatres, the Supreme Court's holding in Parklane Hosiery ... requires us to apply collateral estoppel in this case....

> We believe that the present case prevents a substantially different situation than that before the Supreme Court in Parklane. Here, there is no earlier valid judgment....
>
> It is hardly "needless litigation" to reverse a judgment on the ground that the plaintiff was denied his right to a jury trial through no fault of his own solely because of the error of the trial court. It is inappropriate to apply collateral estoppel to preclude review of an issue on which the appellant could not have previously sought review.... The burden on judicial administration is no more than in other situations in which legal error is committed and a retrial is required.... We cannot sanction an application of collateral estoppel which would permit findings made by a court ... to bar further litigation of a legal issue ... when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim. To permit such an application would allow the district court to accomplish by error what Beacon Theatres otherwise prohibits it from doing.

816 F.2d at 355-57. Judge Posner noted in a concurring opinion that he "agree[d] with everything in" the majority opinion regarding collateral estoppel. The Seventh Circuit rule that collateral estoppel cannot prevent direct appellate review of the denial of a jury trial was reiterated in Volk v. Coler, 845 F.2d at 1437-38. See also id. at 1439 (Manion, J., concurring).

The reasoning and holding in Ritter were also expressly rejected by the Third Circuit in Roebuck v. Drexel University. (No. 87-1301, July 26, 1988). The plaintiff in that case had sought relief from racial discrimination under both section 1981 and Title VII. The district judge initially permitted the 1981 case to be heard by a jury, but when the jury returned a verdict for the plaintiff, the trial judge granted judgment n.o.v. and

ruled for the defendant on the Title VII claim. On appeal the Third Circuit held that the judge had erred in overturning the jury verdict, and ordered a new jury trial of the section 1981 claims.[8] Rejecting the Ritter doctrine that the judge's own decision on the Title VII claim controlled, and thus precluded, a new jury trial, the Third Circuit adopted the opposite rule, vacating the judge's decision on the Title VII claim, and directing him on remand to await, and conform his disposition of that claim to, the jury verdict on the section 1981 claim.

> We acknowledge that in Ritter ... the court held that a district court's findings in a Title VII suit are preclusive in a subsequent trial to a jury on an ADEA claim, even though the ADEA claim itself was filed jointly with the Title VII claim

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[8] A new trial was required for other reasons.

> but had been erroneously dismissed by the district court..... [T]o avoid the problems faced by the Fourth Circuit in Ritter ..., we believe that the better course is that followed by the Seventh Circuit in Volk v. Coler.... In Volk, the court held that where plaintiff had presented sufficient evidence on her §§ 1983 and 1985(3) claims to allow the case to go to the jury, but the district court had improperly taken the case away from the jury, plaintiff was "entitle[d] to a jury trial on the [legal] claims before the trial court decides her Title VII equitable claims." .... Hence, the court set aside the district court's premature Title VII judgment and we do likewise. Cf. Hussein v. Oshkosh Motor Trucks Co.[9]

The Third Circuit expressly disapproved the Fourth Circuit's interpretation of Parklane Hosiery,[10] and noted that Ritter

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[9] Slip opinion, pp. 51-53 (footnote omitted; emphasis in original).

[10] Slip opinion, p. 52 n. 42 ("The Ritter court relied heavily on Parklane Hosier Co. v. Shore.... We, however, find Parklane Hosiery inapposite because, unlike Parklane plaintiff here brought his Title VII and § 1981 suits together and

seemed "inconsistent with th[e] weight of authority."[11]

The Fourth Circuit rule is inconsistent as well with decisions of the District of Columbia and Second Circuits.

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hence is entitled to a jury determination of all common issues of fact.") (emphasis in original).

[11] Slip opinion, p. 49 n. 39. The Fourth Circuit rule in the instant case -- that a judge's decision regarding jury issues must be affirmed, despite the Seventh Amendment, unless clearly erroneous under Rule 52 -- was summarily rejected by the Third Circuit in EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 1225-26 (3rd Cir. 1983) ("Corry Jamestown is mistaken when it argues that the denial of a jury trial is harmless error unless the district court's findings of fact can be shown to be clearly erroneous. To the contrary, denial of a jury trial is reversible error unless a directed verdict would have been appropriate.... In this case ... the Commission's evidence was clearly sufficient to withstand a directed verdict.... The order of the district court striking the Commission's demand for a jury trial will be reversed, and the case remanded for a new trial before a jury." Compare App. 9a (petitioner not entitled to remand for jury trial, despite improper denial of jury trial, if intervening decision on merits by trial judge "was not clearly erroneous").

In Bouchet v. National Urban League, 730 F.2d 799 (D.C.Cir. 1984), the plaintiff complained that the district judge had improperly dismissed her legal claims, and then resolved against her the similar issues raised by her equitable claims. The District of Columbia Circuit concluded that it was obligated to decide whether the dismissal of the plaintiff's legal claims and the resulting denial of a jury trial were proper, since an error in that regard would require not merely a jury trial on the legal claims, but also reversal of the judge's decision as to the equitable claims. Writing for the panel in that case, then Judge Scalia explained:

> [An] erroneous denial of her ... law claims and the consequent denial of her demand for jury trial would infect the disposition of her [equitable] claim as well, since most if not all of its elements would have been presented to the wrong trier of fact. Not only would a jury trial on her tort claims be

> required, but the [equitable] judgment -- even if otherwise valid -- would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury.

730 F.2d at 803-04. This holding in Bouchet was quoted and expressly endorsed by the Second Circuit in Wade v. Orange County Sheriff's Office, 844 F.2d 951, 954-55 (2d Cir. 1988).[12] The Fourth Circuit in Ritter, on the other hand, disapproved Judge Scalia's opinion in Bouchet as inadequately reasoned.[13]

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12 The Second Circuit has also recognized the conflict between the Fourth Circuit decision in Ritter and the Seventh Circuit decision in Hussein. Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647, 651 n. 4 (2d Cir. 1987).

13 814 F.2d at 991:

> "The Bouchet proposition is ... set forth without reference to Parklane, despite the clear relevance of that case to the issues presented. We find th[is] lower court opinio[n] unpersuasive...."

The decisions of the Fourth Circuit in the instant case and Ritter are also squarely contrary to the practice of nine other circuits, which in the period since Parklane Hosiery have reversed and remanded for a jury trial district court decisions that had improperly denied such jury trials, despite the fact that in each case the trial judge, after denying the jury demand, had himself resolved on the merits the issues on which a jury trial had been sought.[14]

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14 Marshak v. Tonetti, 813 F.2d 13 (1st Cir. 1987); Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987); Lewis v. Thigpen, 767 F.2d 252 (5th Cir. 1985); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985); Amoco Oil Co. v. Torcomian, 722 F.2d 1099 (3d Cir. 1983); EEOC v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983); Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982); Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316 (8th Cir. 1981); Palmer v. United States, 652 F.2d 893 (9th Cir. 1981); United States v. State of New Mexico, 642 F.2d 397 (10th Cir. 1981); United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980); Hildebrand v. Bd. of

II. THE DECISION BELOW CONFLICTS WITH EIGHT DECISIONS OF THIS COURT

Judge Widener observed in his dissenting opinion in this case that the decision of the court below "is not consistent with the broad construction of the Seventh Amendment recently given by the Supreme Court in Tull v. United States, 55 U.S.L.W. 451 (U.S. April 28, 1987)." (App. 19a). In fact the panel's opinion conflicts with a total of eight separate decisions of this Court issued over the course of more than a century.

The jury trial issue arises in this case in precisely the same way it has arisen in innumerable past Seventh Amendment appeals. The plaintiff filed a complaint containing a claim within the scope of the Seventh Amendment, and made a

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Trustees of Michigan State Univ., 607 F.2d 705 (6th Cir. 1979); Matter of Merrill, 594 F.2d 1064 (5th Cir. 1979).

timely request for a trial by jury. The district judge, after incorrectly ruling that no jury trial was required, proceeded to consider himself the factual issues raised by the complaint, and decided the case on the merits. For over 130 years this Court has consistently redressed such Seventh Amendment violations by directing that the issues improperly heard by a judge be retried before a jury.

In Tull v. United States, 95 L.Ed.2d 365 (1987), decided only sixteen months ago, the district court, after denying Tull's request for a jury trial, conducted a 15 day bench trial of the merits of the government's claims under the Clean Water Act, resolved the underlying factual disputes in favor of the government, and imposed $70,000 in civil penalties. 95 L.Ed.2d at 371. This Court, concluding that Tull was constitutionally entitled to

a jury trial on the liability issues decided by the judge, reversed the decision below and remanded the case for a jury trial. 95 L.Ed.2d at 378-79. On at least seven prior occasions, the first in 1850, this Court has reversed the erroneous denial of a jury trial and remanded the claims for trial by jury, despite an intervening decision on the merits by a trial judge.[15]

The propriety of redressing Seventh Amendment violations in this traditional manner was expressly upheld in Meeker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963) (per curiam). In Meeker, as in Beacon Theatres, Inc. v. Westover, 359

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15 Pernell v. Southall Realty, 416 U.S. 263 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963); Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932); Baylis v. Travelers' Insurance Co., 113 U.S. 316 (1885); Hodges v. Easton, 106 U.S. 408 (1882); Webster v. Reid, 52 U.S. 437 (1850).

U.S. 500 (1959), the pleadings raised both legal and equitable issues, and a jury trial was duly requested. In Beacon Theatres, which came to this Court prior to trial on a petition for a writ of mandamus, the Court held that in such cases the legal claims must be tried first before a jury, lest a premature non-jury decision on the equitable claims preclude a jury trial on those legal issues. 359 U.S. at 508-11. In Meeker, the trial judge, in violation of Beacon Theatres, had decided the equitable claims first, and then relied on his own decision in favor of defendants to deny plaintiffs a jury trial, or any other relief, on their legal claims. The Tenth Circuit, despite Beacon Theatres, held that the trial court's decision on the equitable claims precluded any jury trial on the legal claim, which alleged slander to title:

> [W]e cannot say that his finding [on the merits of the equitable issues] ... was erroneous. The Meekers would have been entitled to a jury trial of any issues remaining for determination on their [legal] claim. However, the trial court, in the exercise of its equity jurisdiction, had determined ... that the Meekers had no title.... Since the Meekers had no title that could have been slandered by the acts of the defendants, no issues were left to be tried on the Meekers' [legal] claim.

308 F.2d 875, 884 (10th Cir. 1962) (emphasis added). The plaintiffs sought review by this Court to correct "[t]he error of the Court of Appeals in holding that the petitioners were in any way estopped or prohibited from contesting" their legal claims.[16] This Court granted certiorari, and after briefing and argument reversed the Tenth Circuit per curiam, citing Beacon Theatres and Dairy

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16 Petition for Writ of Certiorari, October Term 1963, No. 46, p. 5.

Queen, Inc. v. Wood, 369 U.S. 469 (1962). 375 U.S. 469 (1963).

This case presents precisely the problem anticipated in Chief Justice Rehnquist's dissenting opinion in Parklane Hosiery. The procedural posture of this case is identical to that of Meeker, and, if Meeker is still good law, the decision below is necessarily wrong. The Fourth Circuit, however, believes that Beacon Theatres and Dairy Queen, on which Meeker was expressly based, have since been modified by Parklane Hosiery.[17] The Fourth Circuit's interpretation of the 1979 decision in Parklane Hosiery, as Judge Widener recognized, is simply inconsistent with this Court's 1987 decision in Tull. The Fourth Circuit's insistence that Seventh Amendment

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17 Ritter v. Mount Saint Mary's College, 814 F.2d 986, 990 (4th Cir. 1987).

violations are rendered unreviewable by a subsequent, albeit constitutionally tainted, decision by the trial judge, cannot be reconciled with this Court's century long practice of reviewing and overturning such trial judge decisions.

III. THE DECISION BELOW POSES SERIOUS PROBLEMS FOR EFFICIENT JUDICIAL ADMINISTRATION

The conflicts among the circuits, and between the decision below and the prior decisions of this Court, are important for three distinct reasons. First, the Fourth Circuit decision creates the unprecedented situation in which an acknowledged and prejudicial constitutional violation simply cannot be corrected on direct appeal; indeed, as the instant case demonstrates, the Fourth Circuit's approach precludes appellate panels from even deciding whether there was a constitutional violation at all. Any procedural doctrine precluding direct appellate review of an entire class of constitutional claims would be serious in and of itself. In this instance, moreover, the constitutional provision at issue is directed, not at private persons

or ordinary government officials, but solely at federal judges. If the Fourth Circuit precluded appellate review of claims that prison authorities had violated the Eighth Amendment, those claims would still be subject to evaluation by an independent federal district judge. But where an appellant asserts that a district judge himself violated the Constitution, a denial of appellate review means the appellants constitutional claim will never be heard by a disinterested federal judge.

Second, if the denial of a jury trial can no longer be litigated on direct appeal following an unconstitutional non-jury trial, the only way the appellate courts could enforce the Seventh Amendment would be to intervene prior to trial. The Fourth Circuit bar to direct appeal of such issues eliminates any ground for

denying a writ of mandamus to review a trial court order denying, or granting, a jury trial. Moreover, if, as the Fourth Circuit has held, a denial of a jury trial is no longer subject to direct appellate review after judgment in that circuit, such denials would necessarily fall within the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Until now, the collateral order doctrine has been held inapplicable to denials of jury trials precisely because the circuit courts believed that collateral estoppel could not be used after judgment to prevent appellate review of, and redress for, any Seventh Amendment violation. See e.g., Western Elec. Co. v. Milgro Electronic Corp, 573 F.2d 255, 256-57 (5th Cir. 1978). In the Fourth Circuit today interlocutory appeals are not only a technical possibility but a practical

necessity for any litigant who wishes to preserve his or her asserted right to a jury trial. In the district courts throughout that circuit, any attorney whose request for a jury trial is refused has no choice but to immediately take a protective interlocutory appeal, since he or she is unlikely to be able to raise that constitutional claim on appeal at any stage later in the proceeding.[18] Almost forty years ago in Morgantown v. Royal

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18 It would be an exaggeration to assert that the current state of the law in the Fourth Circuit is entirely coherent. Ritter was decided on April 2, 1987. Four months later, on August 26, 1987, a different panel in that circuit, without referring to Ritter, applied the traditional rule that jury trial claims may be reviewed despite an intervening decision on the issues by a trial judge. Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1987). The instant case was decided on October 20, 1987, and stamped "unpublished," a label which, under Fourth Circuit rules, means that the decision is not as a practical matter available to most attorneys. On April 27, 1988, the fourth circuit denied rehearing in the instant case by a vote of 8 to 3.

Insurance Co., 337 U.S. 264 (1949), this Court, emphasizing that denials of jury trials could be corrected on appeal, held that such denials could not ordinarily be made the subject of interlocutory appeals; Justice Frankfurter emphasized that that decision was necessary to preserve the "deep-rooted general principle" of "[n]onappealability of intermediate orders in the federal courts." 337 U.S. at 261 (concurring opinion). If, however, as Chief Justice Rehnquist feared, Parklane Hosiery has indeed overruled Meeker, then Morgantown too would be bad law.

Third, the Fourth Circuit rule necessarily extends not only to orders regarding jury trials, but more broadly to any decision regarding who is to determine the merits, or any other factual aspect, of a controversy. If, for example, a trial judge improperly referred an issue

to a magistrate, a special master, or a non-Article III judge, collateral estoppel based on the resulting decision would, under Ritter and the opinion below, preclude vindication of a litigant's right to have his or her claim decided by an Article III federal judge. The Fourth Circuit's view of collateral estoppel would seem equally efficacious in preventing direct review of many disputes regarding venue and forum non-conveniens. Similarly, direct appellate review of questions concerning if in the instant case the district judge had granted a jury trial, but had then directed that the case be tried by a jury consisting of only residents of some distant state, or of only 2 jurors, that method of jury composition would of course have been patently illegal, but its verdict under Ritter and the decision below would still

collaterally estop petitioner from trying the claims before a jury selected in a constitutional manner.

All of these problems arise on a regular basis. Since certiorari was denied less than a year ago in Ritter, there have been four other circuit court opinions on the same issue. Wade, Roebuck and Volk in the Second, Third and Seventh Circuits, respectively, have rejected the holding in Ritter, while the instant case has applied and extended Ritter.

IV. THE DECISION BELOW SHOULD BE SUMMARILY REVERSED

In the instant case the substantive legal claim for which petitioner sought a jury trial was an allegation that respondent had violated 42 U.S.C. § 1981 by engaging in racial discrimination in employment. The application of section 1981 to private discrimination in contractual relations, upheld by this

Court in Runyon v. McCrary, 427 U.S. 160 (1976), is now the subject of the scheduled reargument in Patterson v. McLean Credit Union, No. 87-107. Under ordinary circumstances the appropriate disposition of this proceeding would be to hold the petition and defer action until the decision in Patterson. See R. Revesz and P. Karlan, "Nonmajority Rules and the Supreme Court," 136 U.Pa.L.Rev. 1067, 1109-31 (1988).

This case presents a problem, however, which warrants a departure from that practice. If action is deferred pending the decision in Patterson, it is likely that the instant case could not be heard until the October 1989 term, and would not be decided until the spring of 1990. In the intervening years, the decision below, in conjunction with Ritter, will inexorably lead to

considerable confusion and a serious dissipation of judicial resources. Any informed attorney defending on appeal the denial of a jury trial, excepting perhaps in the Second, Third, Seventh and District of Columbia Circuits, would today argue that collateral estoppel precludes appellate consideration of that issue; similar contentions would be equally plausible in appeals regarding venue, forum non conveniens, and any other issue concerning the identity of the correct trier of fact. Any Fourth Circuit attorney whose request for a jury trial is denied in a district court must now pursue an immediate interlocutory appeal, and any attorney who thinks a jury trial was improperly granted undoubtedly must also appeal at once, rather than await final judgment. Cautious lawyers may well feel obligated to do the same in other

circuits, or to file such appeals regarding other types of disputes about the identity of the proper trier of fact. A significant portion of all now pending federal civil cases could well become embroiled in the ensuing tangle of interlocutory appeals, motions, and arguments.

The questions raised by the instant case, however they are to be resolved, ought be resolved with dispatch. If, as has been the law in the past, jury trial and other related issues can still be addressed on direct appeal after final judgment, that should be reaffirmed before the decision below and Ritter wreak havoc in the federal appellate courts. If, on the other hand, interlocutory appeals will henceforth be the only method of raising jury trial and similar trier of fact issues in the circuit courts, federal

litigants throughout the nation ought be told that promptly, before continued reliance on the contrary majority rule creates enormous problems of unfairness and retroactivity.

A prompt resolution of this question might be achieved by granting certiorari and accelerating the time for briefing and arguments, or by granting certiorari and summarily reversing the decision below. We believe that summary reversal would be appropriate. The Fourth Circuit's decision is squarely contrary to the century long practice, in this Court and the circuit courts of appeals, of reviewing on appeal claims that a litigant was improperly denied a jury trial. The decision below that collateral estoppel precludes any appellate consideration of such a claim flies in the face of this Court's decision in City of Morgantown v.

Royal Insurance Co., 337 U.S. 254, 258 (1949), that "[t]he rulings of the district court granting or denying jury trials are subject to the most exacting scrutiny on appeal." Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), held that

> [O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

369 U.S. at 510-11. Surely the Court did not intend that a trial judge's own error in refusing to permit a jury trial, a circumstance present in Dairy Queen itself, could constitute one of the "imperative circumstances" warranting loss of the right to a jury trial; were that the rule, the holding in Dairy Queen would literally be inapplicable in any case in which Dairy Queen itself was violated.

Parklane Hosiery emphasized that collateral estoppel could only be invoked with regard to an earlier decision that had been "fully litigated." 439 U.S. at 327, 328. In the instant case, however, the merits of petitioner's Title VII claims have not been fully litigated; on the contrary, the correctness of the trial judge's action in deciding himself the Title VII claims is one of the central issues in this appeal. Rather than giving collateral effect to a fully litigated issue, the decision below invoked collateral estoppel in order to prevent full litigation, indeed to prevent any appellate consideration at all, of petitioner's claim that the trial judge violated the Seventh Amendment in improperly passing on the merits of the Title VII claims.

The action of the Fourth Circuit bespeaks, not simply a misunderstanding of this Court's Seventh Amendment decisions, but a considered determination to ignore those precedents. On April 2, 1987, the Fourth Circuit held in Ritter that an appellate court could not correct a Seventh Amendment violation by directing that issues improperly decided by a judge be referred instead to a jury. On April 28, 1987, this Court in Tull v. United States, unanimously issued precisely the type of remedial order held impermissible in Ritter. Yet on October 20, 1987, the Fourth Circuit panel in the instant case insisted that appellate courts were powerless to provide the very remedy awarded in Tull less than seven months earlier. Judge Widener, in his dissenting opinion below, correctly observed that the

panel's action "is not consistent with ... Tull v. United States." (App. 19a n. 4).

This Court does not lightly take summary action on the basis of a certiorari petition and opposing papers, in part because of the possibility that summary disposition may fail to come to grips with the full ramifications of a novel issue, in part because of the risk of unfairness to the opposing party. The question raised by this case, however, is not new; it has arisen in this Court and been resolved in a manner contrary to the decision below on repeated occasions over the course of more than a century. The instant petition, by expressly suggesting that this is an appropriate case for summary disposition, affords respondent a reasonable opportunity to present in its memorandum in opposition arguments supporting the decision below or urging

that the issues are of sufficient complexity to warrant full briefing and argument.

CONCLUSION

For the above reasons, certiorari should be granted to review the judgment and opinion of the Fourth Circuit, and the decision below should be summarily reversed.

Respectfully submitted,

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON
RONALD L. ELLIS
JUDITH REED*
ERIC SCHNAPPER
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

PENDA D. HAIR
Suite 301
1275 K Street, N.W.
Washington, D.C. 20005
(202) 682-1300

Attorneys for Petitioner

*Counsel of Record

APPENDICES

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1097

John S. Lytle,

Plaintiff - Appellant,

versus

Household Manufacturing, Inc.
d/b/a Schwitzer Turbochargers,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. David B. Sentelle, District Judge. (CA-84-453-A-C)

Argued: January 6, 1987
Decided: October 20, 1987

Before WIDENER and CHAPMAN, Circuit Judges, and SIMONS, District Judge for the District of South Carolina, sitting by designation.

Penda Denise Hair (Julius L. Chambers; Ronald L. Ellis; Regan A. Miller; James,

McElroy & Diehl on brief) for appellant; Alan Bruce Clarke (H. Lane Dennard, Jr.; Ogletree, Deakins, Nash, Smoak & Stewart on brief) for appellee.

CHAPMAN, Circuit Judge:

The appellant's action for discriminatory discharge and retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission was brought under both 42 U.S.C. § 1981 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The district court dismissed the § 1981 action with a ruling that Title VII provided the exclusive remedy for employment discrimination. A bench trial followed on the Title VII claim. At the conclusion of the plaintiff's case the trial court under Fed. R. Civ. P. 41(b) dismissed the claim for discriminatory discharge, and at the conclusion of all of the evidence the court found for the

defendant on the retaliation claim. The appellant now argues that the trial court erred in dismissing his § 1981 action and that he is entitled to a jury trial on his § 1981 action. We hold that the district court's findings in the Title VII trial collaterally estop the appellant from relitigating these findings before a jury, and we affirm the result reached by the district court.

I.

John S. Lytle had been employed as a machinist for two and one-half years in Household Manufacturing's North Carolina plant. Immediately prior to the discharge which gave rise to this suit, it appears that Lytle had been ill, and had accordingly planned to see a physician on Friday, August 12, 1983. Lytle asked on the day prior to August 12 if he could take the next day off as a vacation day.

Lytle's supervisor informed him that he could take Friday off only he worked on Saturday [sic].

Lytle never informed his supervisor that he would take Friday as a vacation day in exchange for working on Saturday. Lytle claims that he was effectively prevented from informing his supervisor about his intentions by the supervisor's anger at Lytle, arising out of an unrelated incident. For whatever reason, Lytle failed to appear at work either on Friday or on Saturday. Lytle claims that his medical condition prevented him from working on Saturday, and that he informed the plant's Human Resources Counsellor of that problem.

The appellee classified Lytle's absences as "unexcused." Appellee's discharge policy distinguishes between excused and unexcused absences. If

unexcused absences exceed eight hours in a twelve month period it is grounds for dismissal. Accordingly, the appellee terminated Lytle's employment.

Subsequent to his termination, Lytle filed a charge of discrimination with the Equal Employment Opportunity Commission. Lytle then began seeking employment with other businesses in the area, without success. Lytle attributes this failure to the appellee's refusal to provide him with a letter of recommendation beyond a mere acknowledgment that Lytle had been employed by the appellee. It appears that, in one instance, the appellee had provided another employee with an actual letter of recommendation, contrary to express company policy.

Lytle's first legal action was a claim for full unemployment benefits before the North Carolina Employment

Security Commission. The decision of the Commission was appealed to and affirmed by the Buncombe County Superior Court.[1] The Employment Commission and the Superior Court found that Lytle was entitled only to reduced unemployment benefits because his "substantial fault" had contributed his termination [sic]. Lytle filed this action on December 7, 1984 after receiving a right to sue letter from the EEOC. Lytle sought relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging that the appellee had discharged him because of his race and retaliated against him for filing a charge of discrimination with

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[1] Lytle v. Schwitzer Turbochargers and the Employment Security Commission of North Carolina, 84-CVS-1602 (Sept. 10, 1984).

the EEOC. Lytle requested a jury trial on his claims under § 1981.

The district court dismissed the appellee's motion for summary judgment, in which the appellee had argued that the decision of the State Employment Commission served to bar the proceedings. The district court stated that there were unresolved factual issues precluding summary judgment. On February 26, 1986, the district court dismissed Lytle's claims under § 1981 on the grounds that Title VII provides the exclusive remedy for employment discrimination.[2] Lytle then proceeded to try his Title VII claims before the bench. At the close of the plaintiff's evidence, the district

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[2] This ruling was apparently erroneous. In Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471 (4th Cir. 1978), cert. denied, 440 U.S. 979 (1979), we found Title VII and § 1981 remedies to be separate, independent and distinct.

court granted the defendant's motion under Fed. R. Civ. P. 41(b) to dismiss the claim of discriminatory discharge on the grounds that the plaintiff had failed to establish a prima facie case. At the close of all the evidence, the district court entered a verdict for the defendant on the retaliation claim.

II.

This court held in Ritter v. Mount Saint Mary's College, No. 86-3015 (4th Cir. filed March 23, 1987), that the findings of the trial court made in a Title VII action are entitled to collateral estoppel effect, thus preventing the relitigation of those findings before a jury under a "legal" theory arising out of the same facts. We found that collateral estoppel would obtain even where the trial court had erroneously dismissed the plaintiff's legal claims.

As the Supreme Court determined in Parklane Hosiery, Inc. v. Shore, 439 U.S. 322 (1979), the judicial interest in economy of resources is sufficient to override the litigant's interest in relitigating his case, even where the consequence of the failure to permit relitigation is to deny the plaintiff his right to a jury trial.

Whether the district court has committed error in striking the appellant's claims under § 1981 is not controlling. If the district court's determinations arrived at in the course of the bench trial on the Title VII theory are not clearly erroneous, and if the findings made by the judge, if upheld, estop the appellant from establishing a prima facie case under § 1981, then appellant may not relitigate these issues. We proceed to determine whether

the district judge erred in his findings and conclusions in the Title VII law suit.

We perceive no reason to reverse the district court's determination that the appellant failed to establish a prima facie case of discriminatory discharge. Rule 41(b) requires the court to weigh all evidence presented. The district court's finding that the plaintiff had presented no evidence of discrimination is protected by Rule 52(a) and may be set aside only if clearly erroneous. Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986). In Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir.), cert. denied, 472 U.S. 1021 (1985), we discussed the necessary elements for the establishment of a prima facie case of discriminatory disciplinary action. "The . . . prima facie requirement is . . . met upon a

showing (1) that plaintiff engaged in prohibited conduct similar to that of a person of another race, color, sex, religion, or national origin, and (2) that disciplinary measures enforced against the plaintiff were more severe than those enforced against the other person." Moore, 754 F.2d at 1105-06. Lytle has provided no evidence of other employees who had received less severe disciplinary measures as a result of their unexcused absences. Lytle has presented evidence showing that white employees who had exceeded the company limitation on excused absences had received relatively lenient treatment, but the district court was entitled to find that the differences between excused and unexcused absences are significant enough to render those violations

dissimilar.[3] Thus the first prong of the Moore test was not met. The district court was entitled to conclude that the company's treatment of employees exceeding the limitation on unexcused absences could differ from its treatment of employees exceeding the excused absence limitation, without that difference in treatment being discriminatory. Failing to present evidence of similarly situated employees experiencing different treatment, the appellant has failed to establish a prima facie case. We find the other reasons proffered by the appellant to reverse the district court's judgment pursuant to Rule 41(b) unpersuasive.

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[3] Indeed, it appears that the appellant himself was in violation of the company limitations on permissible excused absences.

We also decline to disturb the district court's judgment for the appellee on the claim that the appellee had retaliated against Lytle for his complaint to the EEOC. The appellant has offered no reasons for this court to find that the district court's conclusion was clearly erroneous, and we perceive none. We thus affirm the district court's treatment of the Title VII claim.

III.

The next issue to resolve is whether the district court's conclusions under Title VII, capable of collateral estoppel effect under Ritter and Parklane, prevent the appellant from establishing a prima facie case under his § 1981 theory. It is established beyond peradventure that the elements of a prima facie case of employment discrimination alleging disparate treatment under Title VII and §

1981 are identical. See, e.g., Gairola v. Commonwealth of Virginia Department of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985), and the cases cited therein. "The facts here that preclude relief under Title VII also preclude a Section 1981 claim." Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). Where the elements of two causes of action are the same, the findings by the court in one preclude the trial of the other, and we so hold.

Because we base our affirmance of the district court on the application of collateral estoppel to preclude the relitigation of the factual issues in this case, we do not need to reach the other issues presented by this appeal.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

As the Seventh Circuit has pointed out: "Collateral estoppel is a 'judicially developed doctrine', United States v. Mendoza, 464 U.S. 154, 158 (1984), which, when properly applied, can 'relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and by preventing inconsistent decision, encourage reliance on adjudication.' Allen v. McCurry, 449 U.S. 90, 94 (1980)." Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 355 (7th Cir. 1987). The majority argues that our decision in Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987) (Ritter II) requires the application of collateral estoppel in this case. I disagree and therefore respectfully dissent.

In this court's Ritter decisions, the district court had dismissed the plaintiff's legal claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and Equal Pay Act, 29 U.S.C. § 206(d), on First Amendment grounds. The district court then conducted a bench trial on the equitable claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 et seq. At the close of the bench trial, the lower court made findings of fact adverse not only to the plaintiff's Title VII claims but also findings inconsistent with the maintenance of her ADEA and Equal Pay Act claims. On appeal, in an unpublished opinion we affirmed the district court's Title VII fact finding as not clearly erroneous, see Fed. R. Civ. P. 52(a), but reversed the lower court's dismissal of the plaintiff's ADEA

and EPA legal claims and remanded the case for proceedings consistent with our opinion. Ritter v. St. Mary's College, No. 81-1534 (4th Cir., June 8, 1984) (unpublished) (Ritter I).

On remand, the district court determined that its findings made in the Title VII equitable suit collaterally estopped the relitigation of those same facts before a jury on the remanded ADEA and Equal Pay Act legal actions. We affirmed that lower court ruling. Ritter II, 814 F.2d at 992. I think it most significant that no question was raised in Ritter I that the erroneous conclusion of law of the district court had deprived plaintiff of her Seventh Amendment right of trial by jury. That question was not raised until after remand in Ritter II. Having failed to appeal the issue in the first appeal, it would not seem too

unreasonable to apply collateral estoppel the second time around. Cf. Hussein, 816 F.2d at 359, Judge Posner concurring.

This case, however, is significantly different than Ritter II. Here, the lower court erroneously concluded that the § 1981 claims were precluded by the Title VII claims. By its erroneous holding that Title VII was the exclusive remedy for employment discrimination, it specifically denied the plaintiff his right to trial by jury and that is the point which is appealed. In other words, the sole reason that plaintiff has been denied his right to a jury trial is the erroneous ruling of the district court which was appealed as soon as the opportunity presented itself. This is not, therefore, a case like Ritter II where the district court's error was let slide until the second appeal. If a

litigant can be denied the right to a jury trial simply because a district court has come to a justifiable factual conclusion in a trial without a jury, the Seventh Amendment means less today than it did yesterday.[4]

Furthermore, it is significant that the Seventh Circuit, when faced with exactly this issue on indistinguishable facts, has determined that "an application of collateral estoppel does not permit findings made by a court in [a Title VII] proceeding to bar further litigation of [§ 1981] claim that had been properly joined...." Hussein, 816 F.2d at 356.

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[4] The majority's decision here, I suggest is not consistent with the broad construction of the Seventh Amendment recently given by the Supreme Court in Tull v. United States, 55 USLW 4571 (U.S. April 28, 1987). In Tull, the Court reversed our narrow reading of the right to trial by jury.

I am also disturbed by the justification of the denial of a litigant's Seventh Amendment right to a jury trial by reason of judicial interest in economy of resources. This reason undoubtedly existed at the time of the ratification of that Amendment and has since. In my opinion, however, it does not suffice as a policy argument to circumvent a positive provision of our organic law. To my way of thinking, in the event of a policy contest between judicial economy and the Seventh Amendment, the Amendment should prevail.

Accordingly, I would vacate the judgment of the district court and remand this case for trial by jury on all the issues so triable. See Ritter II, 814 F.2d at 990, citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).[5]

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5 Hussein only remanded the § 1981 claim, not the whole case, but for procedural reasons. See the concurring opinion of Judge Posner. 816 F.2d at p. 359.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-

Apr. 27, 1988

John Lytle,

Plaintiff-Appellant,

v.

Household Mfg., Inc., Inc.,
d/b/a/ Schwitzer Turbo Chargers,

Defendant-Appellee.

On Petition for Rehearing and Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc and appellee's answer thereto were submitted to this Court.

On the question of rehearing before the panel, Judge Widener voted to rehear the case. Judge Chapman and District

Judge Simons, sitting by designation, voted to deny.

In a requested poll of the court on the suggestion for rehearing in banc, Judges Russell, Widener and Murnaghan voted to rehear the case in banc; Chief Judge Winter and Judges Hall, Phillips, Sprouse, Ervin, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman.

For the Court

s/ JOHN M. GREACEN
CLERK

* * * *

DISTRICT COURT DECISION FROM THE BENCH
TRIAL TRANSCRIPT of FEBRUARY 26, 1986

The above-entitled matter came on for hearing on Wednesday, February 26, 1986, at Asheville, North Carolina, before the Honorable David B. Sentelle, Judge Presiding.

The following proceedings were had and taken.

THE COURT: This is the case of John S. Lytle versus Household Manufacturing, Inc. d/b/a Schwitzer Turbochargers. The first question the Court has is is that a jury case or a nonjury case?

MR. MILLER: Your Honor, this is a jury case. As we stated in our brief, both the retaliation issue and the discharge issue are cognizable under Section 1981, and we have cited cases in our brief, the Goff case, specifically

with respect to the issue of retaliation, and the Johnson v. Railway Express case with respect to the Supreme Court decision saying that the remedies offered by Section 1981 simply augment the remedies offered by Title VII and do not preclude bringing a case under 1981 and having a jury trial on those issues.

* * * *

THE COURT: I will find from the pleadings in this cause that there is no independent basis alleged in the 1981 action. I will conclude, based upon the reasoning of the Tafoya case, that Title VII provides exclusive remedy, and this case will be tried by the Court without a jury, and the 1981 claim is dismissed. Your exception is noted for the record.

* * * *

As to the discharge claim, I will make the following findings:

That the defendant is an employer who employed -- I don't recall the exact number of people, but I will make a finding that they employed a number of people for a number of hours in excess of the threshold set out with reference to Title VII cases;

I will further find that John S. Lytle was an employee of the defendant during the relevant period;

I will find that he is Black;

I will find that the company did have the attendance policy as set out in Exhibit 22, in the paragraphs headed "Excessive Absence" with the subheading "Excused Absence, Tardy, or Leaving Early," and "Unexcused Absence, Tardy, or Leaving Early;"

I will find that plaintiff has shown evidence of four white employees who violated the excused absence policy and

were given warnings, and of one white employee who had six minutes, approximately six minutes of excessive unexcused absence, tardiness, or leaving early, and that he was given a warning;

I will find by plaintiff's own evidence plaintiff had excess unexcused absence of 9.8 hours, and that, with reference to this unexcused absence, he did not follow the company policy of calling in;

I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was

discharged for violation of the company's policy, but I will conclude as a matter of law that he has not established a prima facie case, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;

And I will order that the claim as to the discharge be dismissed.

Again, I will deny the motion as to the claim of retaliation.

* * * *

THE COURT: The only evidence to the contrary, or the evidence that that's the policy is one letter. And that doesn't make Mr. Lytle's treatment disparate, it makes Mr. Carpenter's treatment disparate; and I will, at the close of all the evidence reaffirm by prior findings of fact, add the addi-

tional finding of fact that Mr. John S. Lytle did file the charge of discrimination against Schwitzer Turbochargers with the EEOC on or about August 23, 1983;

The further finding of fact that when asked for references from prospective employers, the defendant provided only the dates of employment and the job title and, if requested, a description;

Further find as fact that that was based upon the defendant's corporate understanding of its legal right and to protect it from obligations that might be incurred by the release of negative information;

Further find as fact that defendant corporation, acting through Lane Simpson, did on one occasion grant a favorable reference letter to one terminated employee;

Further find as fact that the granting of that one favorable reference letter was done through inadvertence;

Further find as fact that there is no evidence of discrimination against John S. Lytle based upon his having made complaint to EEOC.

Conclude as a matter of law that there is no foundation in law for the retaliation claim. And the conclusion of law that I made in the first conclusion, that I have jurisdiction of this action, and I will enter a judgment in favor of the defendant on all claims.

* * * *

[Proceedings concluded.]

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Mildred N. Shields July 16, 1986

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CASE NO. A-C-84-453

Decided Mar 12, 1986

John Lytle,

Plaintiff,

v.

Household Mfg., Inc.,
d/b/a Schwitzer Turbo Chargers,

Defendant.

JUDGMENT IN A CIVIL CASE

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the

Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by reason of this action. Each party shall bear their own costs.

Date: February 27, 1986 THOMAS J. McGRAW
Clerk

s/ Lisa A. Mather
(By) Deputy Clerk

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

Docket NO. A-C-84-453

Decided Mar 12, 1986

John Lytle,

Plaintiff,

vs.

Household, Mfg., Inc.,
d/b/a/ Schwitzer Turbo Chargers,

Defendant.

ORDER

THIS MATTER came to be heard at the close of the plaintiff's evidence in this non-jury matter, on the defendant's motion to dismiss.

IT APPEARING to the Court that the plaintiff has failed to establish a prima

facie case of discriminatory acts by the defendant as to the plaintiff's discharge, this motion was allowed in open court.

As to the retaliation claim at the close of all the evidence, the court entered verdict for the defendant for the reasons stated in open Court.

IT IS THEREFORE ORDERED that all claims against the defendant in this case are dismissed.

This 27th day of February, 1986.

David B. Sentelle
DAVID B. SENTELLE
United States District Judge

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